

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 4, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1978-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Gary Brown,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Gary Brown appeals from a judgment entered after a jury found him guilty of operating a motor vehicle while under the influence of an intoxicant, contrary to §§ 346.63(1)(a) & 346.65(2), STATS. He also appeals from an order denying his postconviction motion, which alleged ineffective assistance of trial counsel and sought a new trial in the interests of justice. Brown claims: (1) that he received ineffective assistance of trial counsel because his attorney failed to obtain and introduce certain medical records that

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

would have bolstered his credibility and failed to introduce the traffic citations and police reports; and (2) that he should be granted a new trial in the interests of justice. Because Brown received effective assistance of trial counsel and this court does not find that he is entitled to a new trial in the interests of justice, this court affirms.

I. BACKGROUND

On April 20, 1993, City of Milwaukee Police Officers, Dennie Sanchez and Rebecca Carpenter were on routine patrol. At approximately 3:16 a.m., they observed a vehicle traveling at a high rate of speed in the opposite direction of the officers' squad car. The officers turned around to follow the suspect vehicle. They observed the vehicle go through a red light. Although the officers momentarily lost sight of the vehicle, they managed to catch up with the vehicle when the driver parked near a housing project.

The officers approached the vehicle. Brown was the driver of the vehicle. Sanchez testified that Brown seemed unsteady, had glassy eyes, and smelled of alcohol. Carpenter testified that Brown smelled of alcohol, seemed unsteady, had red eyes and slurred speech, and used the car to support himself as he exited the vehicle. Brown refused to perform field sobriety tests. He was handcuffed and transported to the police station. Brown had difficulty getting out of the car and tripped and fell. Sanchez testified that although Brown had fallen out of the squad car, Sanchez was not told that Brown had injured himself. Brown initially agreed to take an intoxilyzer test, but then refused. Brown was placed in a holding cell to await transfer to the county jail.

Brown's defense was that he was not driving the vehicle that the police were attempting to stop and that he had not been drinking. He testified that he had left his job at Wisconsin Electric shortly after 2 a.m. and drove directly to the Hillside Housing Project. He denied even being at the intersection where the officers said they had observed the suspect vehicle go through a red light. He also testified that Sanchez had pulled him out of the squad car by the ankles, causing him injury and that he had asked to see a doctor.

Sanchez testified that he was sure that Brown's vehicle was the one they had followed because it was the only car in the area. The officer denied pulling Brown out of the vehicle and denied hearing Brown ask to see a doctor. The jury convicted Brown. He subsequently filed a postconviction motion alleging ineffective assistance and seeking a new trial in the interests of justice. He claimed that his attorney should have procured his medical records documenting injuries caused by Sanchez pulling him out of the squad car. He testified that after he was released from jail, he went directly to St. Michael's Hospital, where he was treated for abrasions to his left shoulder and back. He also saw his personal physician the following day. His attorney testified that Brown never told him that he had gone to St. Michael's and that although he did say he saw his personal attorney, it was not until several days later. His attorney felt that medical records several days post-arrest would not be beneficial to the defense.

Brown also claimed that his trial counsel should have introduced the traffic citations/police reports because there was some discrepancy with respect to the time of the arrest. The citations appeared to have the time recorded as 2:20 a.m., and one police report appeared to have a 3 written over the 2. Brown argued that these documents would have supported Brown's version of events. His trial attorney testified that he did not introduce the traffic citations/police report because he felt the jury would view that argument as "nit-picking." Brown also alleged in his postconviction motion that his judgment should be reversed in the interests of justice. The trial court denied these motions. Brown now appeals.

II. DISCUSSION

Brown raises two instances of alleged ineffective assistance of trial counsel: (1) failure to obtain and introduce into evidence medical records; and (2) failure to introduce the traffic citations/police report. This court addresses each *seriatim*.

Before addressing each, however, this court outlines the appropriate legal standard and standard of review relevant to Brown's claims. Brown has a Sixth Amendment right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to prove that he has

not received effective assistance, Brown must show two things: (1) that his lawyer's performance was deficient, and, if so, (2) that "the deficient performance prejudiced the defense." *Id.* at 687. A lawyer's performance is not deficient unless he committed errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* In order to show that counsel's performance was prejudicial, Brown must prove that the errors committed by counsel were so serious that they deprived Brown of a fair trial, a trial whose result is reliable. *See id.* In other words, in order to prove prejudice, Brown must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In assessing Brown's claim that his counsel was ineffective, we need not address both the deficient-performance and prejudice components if Brown cannot make a sufficient showing on one. *See id.* at 697. The issues of performance and prejudice present mixed questions of fact and law. *State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). Findings of historical fact will not be upset unless they are clearly erroneous. *Id.* Whether counsel's performance was deficient or prejudicial are legal issues that this court reviews *de novo*. *Id.*

A. Medical Records.

Brown claims that his trial counsel should have obtained and introduced medical records from his personal physician and from St. Michael's Hospital documenting that he had been injured during the arrest. This court has reviewed the record and concludes that trial counsel's failure to do so did not render his assistance ineffective.

Trial counsel testified that Brown did not tell him that he had sought treatment from St. Michael's and that Brown told him that he had seen his personal physician three or four days after the arrest. Counsel explained that based on the delay in time, he did not think these records would assist the defense and that Brown's injuries could be explained by the officer's testimony that Brown had fallen out of the squad car. In ruling on Brown's motion, the trial court found that Brown did not tell counsel about his trip to St. Michael's

and that Brown told counsel that he saw his personal physician several days after the arrest. These findings are not clearly erroneous as each is supported by the testimony of counsel and Brown at the postconviction hearing.

Based on these facts, this court cannot conclude that trial counsel's performance was deficient with respect to the medical records. Counsel was not even aware of the hospital records and, as amply stated by the trial court, "it's eminently reasonable of [counsel] to conclude that getting any doctor's report to corroborate [the injuries] would be of little use at all given the passage of time of three to four days before seeking medical treatment." This court agrees that under these circumstances, trial counsel's decision to not obtain the physician records was reasonable. Therefore, this court rejects Brown's claim that counsel's failure to obtain and introduce the medical records constituted ineffective assistance.

B. Traffic Citations/Police Report.

Brown also claims that his trial counsel should have introduced the traffic citations, which had the time of the stop recorded as 2:20 a.m. and the police report, which appeared to have changed the time from 2:16 to 3:16 a.m. Counsel testified that he decided against introducing this evidence because it was not relevant to the defense theory and because counsel feared the jury would view it as nit-picking. He also feared that focussing on these reports would highlight the time gap—Brown says he left work at 2 a.m. and drove right home, but the officers said the stop occurred at 3:20 a.m. Counsel was concerned about drawing attention to the time gap because Brown did not have any explanation as to where he was during this time.

This court agrees with the trial court that trial counsel's decision not to offer this evidence was a reasonable strategic choice. The record indicates that there were multiple police reports that showed that the arrest occurred at 3:20 a.m. Accordingly, counsel's belief that the contradicting times were simply inadvertent mistakes rather than an attempt to cover up the true time of the stop certainly was reasonable. Moreover, the trial court found the officers' testimony regarding the time of the stop to be more credible than Brown's testimony that the stop actually occurred earlier. Credibility determinations are

left to the discretion of the trial court. *Gehr v. City of Sheboygan*, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977).

Based on the foregoing, this court concludes that counsel's decision to not introduce the traffic citations/police report did not constitute deficient performance. Accordingly, this court rejects Brown's claim that counsel's failure to do so rendered his assistance ineffective.²

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

² In addition, this court has not been presented with anything which would lead it to conclude that Brown should be granted a new trial in the interests of justice. His argument in this regard merely repeats his claims that he received ineffective assistance of trial counsel. This court has rejected these claims and likewise, rejects his request for a new trial. See *State v. Marhal*, 172 Wis.2d 491, 507, 493 N.W.2d 758, 765 (Ct. App. 1992) (“Larding a catch-all plea for reversal adds nothing.”).